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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re David Dodart

Serial No. 75/469,963

K. S. Cornaby of Jones, Waldo, Holbrook & McDonough for
David Dodart

Kelley L. Wells, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney)

Before Seeherman, Rogers and Drost, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

David Dodart has appealed from the final refusal of
the Trademark Examining Attorney to register SBO as a
trademark for "dietary food supplements."¹ Registration has
been refused pursuant to Section 2(e)(1) of the Trademark
Act, 15 U.S.C. 1052(e)(1), on the ground that the term for
which registration is sought is merely descriptive of the

¹ Application Serial No. 75/469,963, filed April 20, 1998, and
asserting first use and first use in commerce on August 31, 1995.

identified goods, and pursuant to Sections 1, 2 and 45 of the Act, 15 U.S.C. 1051, 1052 and 1127, on the ground that the term does not function as a trademark.

Applicant and the Examining Attorney have filed briefs. Applicant originally requested an oral hearing, but subsequently withdrew that request.

Before turning to the refusals, we must address an evidentiary issue. With his response to the first Office action, filed June 24, 1999, applicant stated that he was submitting additional specimens. In the next (and final) Office action, the Examining Attorney advised applicant that no specimens had been included with the response. Applicant then, with his appeal brief, submitted three labels, stating that they had previously been submitted with the June 24, 1999 response. Normally we would accept these replacement labels. However, with her appeal brief, the Examining Attorney has objected to these labels, stating that "as evidenced by the record these are not the same specimens which were submitted with the Applicant's December 31, 1998 [sic] response."² It is not clear how the Examining Attorney would know that the specimens were not

² The Examining Attorney apparently misidentified the date; the Office action to which applicant had responded was dated December 31, 1998.

the same, since in the July 31, 2000 Office action she stated that no specimens had been submitted. We cannot, on review of the file, definitively state that the labels submitted by applicant were not the same as those said to have been previously submitted. It is possible that they were submitted but not associated with the file, in which case the Examining Attorney's objection that they represent an impermissible addition to the record would be inapposite. Accordingly, we have considered them.

We turn first to the refusal on the ground that the term sought to be registered, SBO, is merely descriptive of dietary food supplements. In support of this refusal, the Examining Attorney has made of record printouts from various websites, including some which, according to applicant, are "references generated by Applicant and/or his authorized representatives/sales people/distributors" (response filed June 24, 1999). The following are excerpts from these websites:

What are Soil-Based Organisms
SBO's, or soil-based organisms, are tiny microbes that live in soil. According to medical research scientist Dr. William C. Bryce, M.D., Phd, among other functions, SBO's produce and release powerful enzymes that sterilize the soil of putrefactive organisms, and thereby help prepare the soil to support new plant growth. Without SBO's, such plant growth could not take

place because the soil would be too contaminated with yeasts, molds, fungi, candida and other harmful organisms that are antagonistic to plant growth and reproduction. The enzymes produced by the SBO's solve this problem by helping kill off huge amounts of the harmful elements in the soil.

Most American don't realize it, but many forms of SBO's, as well as their enzyme, hormone and nutrient by-products, are unknowingly ingested into the human system - with very beneficial effects - when all fresh fruits and vegetables are eaten. ... Today, however, human ingestion of SBO's and their beneficial by-products is far less common. This is because modern agricultural techniques ... tend to kill off SBO's on fruits and vegetables. Nonetheless, SBO's still manage to find their way into the human system today, though in this country with far less frequency than times past.

www.naturesbiotics.com

In the late 1970's, an American scientist named Peter Smith began conducting phased studies on huge colonies of soil-based organisms (SBO's). Soil-based organisms are minute microbes that live in soil. They produce and release powerful enzymes that prepare and purify soil to support plant growth. Additionally, SBO's simultaneously produce and release specific nutrients necessary to accelerate plant development and reproduction. Many forms of SBO's, as well as their enzyme and nutrient by-products, are consumed when humans eat fresh, organically grown fruits and vegetables.

www2.upwardquest.com

Most health professionals recommend a blend of varying species of probiotics that include lactobacillus and bifidophilus in amounts of from two to seven billion micro-organisms. More recently, a variety of soil based organism (SBO's) have been discovered to be extremely beneficial for those with severe gastrointestinal distress and compromised immune systems. SBO's enhance nutrient absorption by as much as 50%, and have the ability to get behind putrefaction that has stuck to the colon wall and devour it away.... Perhaps the most exciting characteristic of SBO's is their stimulation of the production of sixteen strains of natural alpha interferon which are key regulators of the immune system.
[excerpted from an article entitled "Probiotics: Friendly Bacteria That Are Essential to Health," by Terri L. Saunders]
<http://inannareturns.com>

In addition, the Examining Attorney has submitted pages from a third-party website and an article taken from the NEXIS database, excerpts of which follow:

ELIXA

...

Our FRIENDLY COLONIZER is a synergistic formulation in which all ingredients have been chosen for their ability to work together to enhance our intestinal terrain. The foundation for our FRIENDLY COLONIZER are soil-based microorganisms. The availability of beneficial soil-based microorganisms (SBOs) in our diet has been greatly reduced through modern agricultural techniques. SBOs are ingested when we

eat fresh, raw, organic plant life grown in rich soils, which is not all that common today. Our SBOs have been selectively breed [sic] to produce internally the rich, balanced "soil" that we so often lack.

...
SBOs also stimulate the body's own production of alpha-interferon, a key regulator of our immune response. ...
www.elixa.com

Soil-based Organisms (SBO's) - This culture of non-pathogenic bacteria is native to the human intestines and absolutely essential in maintaining good health. These friendly intestinal flora feed on putrefaction and waste, fungi, harmful bacteria
[taken from a listing of items that boost the immune system]
"Healthy & Natural Journal,"
December 11, 1998

A mark is merely descriptive, and therefore prohibited from registration by Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods with which it is used. **In re Gyulay**, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

We find that SBO is merely descriptive in that it immediately conveys to purchasers knowledge of an ingredient of applicant's dietary food supplements. A review of the material of record shows that SBO would immediately be recognized by the relevant public as the equivalent of "soil based organisms." Applicant himself

has acknowledged that "soil based organisms" are ingredients in dietary food supplements. "It is clearly recognized that Appellant was the first to recognize and identify soil based organisms and to use them in dietary food supplements." Brief, p. 3. Although applicant states that it coined the term "soil based organisms," the manner in which it has been used by applicant, his affiliates, and third parties, is as the common name for the micro-organisms. Moreover, the term SBO is used by applicant, his affiliates and third parties as an equivalent term to "soil based organisms." Although applicant argues that any recognition by the industry of the term SBO came about as a result of applicant's "legitimate use of its [sic] mark SBO in commerce as a Mark for any [sic] ingredient in its Dietary Food Supplement, identified as NATURE'S BIOTICS®," brief, p. 2, we disagree. It is clear from the submitted material that the manner in which applicant and/or his distributors and marketers use SBO is not as a trademark, but as an abbreviation for the phrase "soil based organisms." Just as the term "soil based organisms" would be merely descriptive of an ingredient in a dietary food supplement, the term SBO, its equivalent, is similarly merely descriptive.³

³ The Examining Attorney did not raise the question as to

The second ground for refusal is that SBO, as used by applicant, fails to function as a trademark for dietary food supplements. In order to determine whether a term functions as a trademark, we must consider how it would be perceived by the consuming public. To do that, we must look to the manner in which applicant is using the asserted mark. **In re Volvo Cars of North America Inc.**, 46 USPQ2d 1455 (TTAB 1998).

Applicant has furnished three sets of specimens, all of which are labels for "A Dietary Supplement" on which the trademark NATURE'S BIOTICS appears most prominently. Above that trademark is the trade name "Life Science Products, Inc." On one side of the box bearing this mark and trade name are two paragraphs indicating "Suggested Use." On the other side is a list of ingredients, which bears the caption, "INGREDIENTS." These ingredients are printed in type so small that many people would have difficulty making out the words. A photocopy of the label applicant submitted with his appeal brief is reproduced below in actual size.⁴

whether applicant's identification of goods as "dietary food supplement," rather than "ingredient in a dietary food supplement" was correct, and therefore this issue is not before us on appeal.

⁴ There are two other sets of labels on the specimen page of the application, showing slightly different versions of the label. It is likely that one set was submitted with the original

Under the word "INGREDIENTS" appears the following list: "Lactobacillus Acidophilus, Bifidobacterium Bifidim, Bacillus Lichenformis, Bacillus Subtilis, Lactobacillus Lactis, Lactobacillus Bulgaricus, symbiotized in a proprietary SBO™ host medium of minerals and trace elements.

This usage by applicant does not show SBO as a trademark. Not all words or symbols used in the sale of goods function as trademarks. To function as a trademark, a term must be used in a manner which projects to

application, and possible that the other set was submitted by applicant with his response filed June 24, 1999, and detached by clerical staff at the United States Patent and Trademark Office from the response and transferred to the specimen page, which would explain why the Examining Attorney reported, in the July 31, 2000 Office action, that she was unable to find specimens with the response. In any event, one set of these other labels is identical to the labels submitted with applicant's appeal brief, except that they do not have a TM symbol placed next to the term SBO. The other set is extremely similar to the other two, except that it does not contain a table of nutrition facts, and the ingredients therefore are more spread out. This set, too, does not display a TM next to SBO.

purchasers a source of the goods. **In re Morganroth**, 208 USPQ 284 (TTAB 1980).

As shown in applicant's labels, which are the only evidence we have of applicant's asserted trademark use, the term SBO is barely noticeable. Rather, it is virtually hidden in the list of ingredients. Even assuming that consumers would read the list and persevere long enough to reach the reference to SBO, they will not regard SBO as a trademark for dietary food supplements. Instead, the term SBO appears in an informational manner, and advises consumers as to the manner in which the ingredients are combined, i.e., they are symbiotized in a proprietary SBO host medium of minerals and trace elements. Because SBO means soil-based organism, and the consumers for this product would be aware of this meaning, they would regard SBO as simply indicating that a unique or proprietary mix is the host medium used to symbiotize the soil based organisms which are the ingredients in applicant's product. The fact that applicant uses the word "proprietary" and the TM symbol in connection with SBO does not cause SBO to be viewed as a trademark for his dietary food supplement, or even for an ingredient in his dietary food supplement. The word "proprietary" modifies "SBO host medium," such that

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while the medium may be seen as a creation of applicant, the acronym SBO will not be.

Applicant points out that SBO is depicted in all capital letters on the label. Although this is true, and it is also true that trademarks are generally depicted in capital letters, it does not follow that all terms depicted in capital letters will be viewed as a trademark. Terms that are acronyms, as SBO is an acronym for soil based organisms, are generally depicted in all capital letters too. The same is true with respect to applicant's use of the TM symbol. The mere addition of a TM symbol does not magically transform into a trademark a descriptive term which appears in a list of ingredients.

Decision: The refusals on the grounds that the term sought to be registered is merely descriptive and does not function as a mark are affirmed.